

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Request by ALTS for Clarification
for Clarification of the Commission's Rules
Regarding Reciprocal Compensation for
Information Service Provider Traffic

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CCB/CPD 97-30

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), through undersigned counsel and pursuant to the Commission's Public Notice (released July 2, 1997), hereby submits its comments in support of the request for expedited clarification of the Commission's rules ("Request") filed by the Association for Local Telecommunications ("ALTS") on June 20, 1997.

STATEMENT OF INTEREST

RCN currently operates as a facilities-based competitive local exchange carrier ("CLEC") in Massachusetts and plans to operate as a facilities-based CLEC in New York in the near future.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 251(b)(5) of the Communications Act of 1934 ("Act") obligates all local exchange carriers ("LECs") to "establish reciprocal compensation arrangements" to pay the transport and termination costs for originating calls that terminate on the networks of other carriers. 47 U.S.C. § 251(b)(5). In the Interconnection Order,¹ the Commission interpreted

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and

this obligation to apply only to "local telecommunications traffic," thereby excluding interexchange calls. 47 C.F.R. § 51.701(a). Incumbent local exchange carriers ("LECs") around the country have asserted that when their end users place a local telephone call to Internet service providers ("ISPs") served by CLECs, the traffic is not local in nature and not eligible for reciprocal compensation.

These incumbent LECs are entirely mistaken, and ALTS's position in the Request is correct: calls to ISPs are "local telecommunications traffic" within the meaning of the Commission's rules and accordingly qualify for reciprocal compensation under interconnection agreements negotiated pursuant to Section 251(b)(5) of the Act. In these comments, RCN demonstrates that:

- (1) traffic to ISPs is physically indistinguishable from traditional local traffic;
- (2) traffic to ISPs is local traffic under applicable jurisdictional standards; and
- (3) if traffic to ISPs is not local, Regional Bell Operating Companies ("RBOCs") could not carry it at all and independent LECs could only do so through a separate affiliate.

As the Commission delves into this issue further, it will realize that incumbent LECs are upset only because CLECs have earned the business of many ISPs. Incumbent LECs thus would turn the law on its head to undo this competitive outcome.

ARGUMENT

I. TRAFFIC TO ISPS IS PHYSICALLY INDISTINGUISHABLE FROM LOCAL VOICE TRAFFIC

Traffic to ISPs and local voice traffic are physically identical and, for each type of call,

Order (released August 8, 1996) (hereinafter "Interconnection Order").

the terminating LEC incurs transport and termination costs in the same manner.

A. There Are No Physical Differences Between Traffic to ISPs and Local Voice Traffic

Incumbent LECs would have the Commission exempt calls to ISPs from reciprocal compensation obligations, even though this traffic is physically no different than local voice traffic. The calls of incumbent LEC customers to an ISP served by a CLEC travel over the same facilities as local voice traffic terminated to a CLEC's other customers, and incumbent LECs could not allege otherwise. At best, the only conceivable difference between the traffic is that callers to an ISP use a computer modem. However, callers can use modems for purposes other than calling an ISP. In any event, that practice does not alter in any respect the nature of the facilities used to terminate the calls, nor does it change the fact that they originate and terminate "within [the same] local service area." 47 C.F.R. § 51.701(b)(1). Traffic to ISPs of which incumbent LECs complain is no less local than any other local traffic.

B. CLECs Incur the Same Costs to Terminate the Calls of Incumbent LEC Customers to ISPs as They Do to Terminate Local Voice Traffic

Traffic to ISPs and local voice traffic are not only physically indistinguishable, they both cause the terminating carrier to incur costs in exactly the same manner. For instance, RCN incurs the same costs to terminate a two minute conversation between individuals, as it does to terminate a two-minute call to America On-Line by a person viewing his or her electronic mail. In seeking to have traffic to ISPs declared interLATA, incumbent LECs would have the Commission force CLECs to terminate the calls of incumbent LEC customers for free. Obviously, cost-causative principles strongly counsel against the position of incumbent LECs.

II. JURISDICTIONALLY, TRAFFIC TO ISPS IS LOCAL TRAFFIC

Under the applicable legal standards, traffic to ISPs falls within the local jurisdiction. As shown below: (1) because ISPs are not common carriers under the Act, traffic to an ISP terminates at the ISP's premises, which is almost always within the local serving area of the caller, and is therefore local traffic; (2) the Commission considers information services offered by ISPs and access to ISPs via a local call to be separate services, either of which may be interLATA in nature without affecting the status of the other; and (3) attempts of incumbent LECs to classify traffic to ISPs as interLATA based on the "end-to-end" test are unavailing.

A. Because ISPs Are Not Common Carriers Under Title II of the Act, But Rather Are Enhanced Service Providers, Calls Terminate When They Reach an ISP's Premises and Hence Are Local Calls

ISPs are not common carriers subject to the regulations in Title II of the Act, for they provide only enhanced services.²⁴ Like many service-oriented end-users, ISPs sell a product to consumers, who are also end-users of the public switched-network. ISPs are substantively no different than a local reference librarian, who often provides information over the phone upon request. Assuming that the individual requesting the information is calling within the LATA, although the librarian may utilize a computer database such as Westlaw or Lexis to find the requested information, the nature of the medium does not change the fact that the call is still a local one for which compensation is due.

²⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, Docket No. 20828 (rel'd May 2, 1980), at para. 119; 47 C.F.R. §64.702(a) ("Enhanced services are not regulated under Title II of Act.") Internet access is an enhanced service. *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 96-262 (rel. Dec. 24, 1996) at para. 284.

An ISP operates in a similar manner. Subscribers call a local telephone number through a modem, which the ISP answers on its premises within the same LATA. For purposes of compensation, this action terminates the call. How the ISP end-user provides service to the consumer is irrelevant. The incoming call and the action of the ISP in providing access to various information services on the packet-switched network of the Internet are separate transactions, not one continuous interLATA call, as the incumbent LECs argue. As long as the subscriber is calling premises located within the same LATA, the call must be compensated in the same manner as any other local call, as required by Section 51.701(b)(1) of the Commission's Rules. 47 C.F.R. § 51.701(b)(1) (local telecommunications traffic "originates and terminates within a local service area").

B. Under the Commission's Non-Accounting Safeguards Order, Information Services Offered by ISPs and the Local Call Used to Access ISPs Are Separate Services that Do Not Affect Each Other's InterLATA Status (or Lack Thereof)

In arguing that calls placed to ISPs do not terminate at the premises of those ISPs, but rather somewhere on the Internet, and are therefore interexchange calls, incumbent LECs have suggested that the interexchange status of an ISP's business affects the jurisdictional classification of the call used to access an ISP. In this way, incumbent LECs bundle the local call to an ISP with the ISP's possible use of interexchange Internet sites and declare the entire transaction to be an interLATA call.

This line of argument is fundamentally at odds with the Commission's treatment of

ISP services and the calls used to access them. In the Non-Accounting Safeguards Order,³² the Commission considered information services, such as those offered by ISPs, and the calls used to access information services as entirely distinct and independent components of what otherwise might appear to be a single transmission. Non-Accounting Safeguards Order, at ¶ 120. In that proceeding, the Commission held that an information service is interexchange in nature only if it “incorporates a bundled interLATA telecommunications transmission component.” *Id.* Consequently, the fact that customers may use an information service in coordination with interexchange telecommunications service does not transform that information service into an interexchange offering:

When a customer obtains interLATA transmission service from an interexchange provider that is not affiliated with a BOC, the use of that transmission service in conjunction with an information service provided by a BOC or its affiliate does not make the information service a BOC interLATA service offering.

Id. Under the Commission’s logic, the converse also should be true: the purely local call placed to an ISP does not become an interLATA telecommunications service merely because the ISP offers interLATA information services. The jurisdictional classification of an ISP’s service offerings and the local call used to access them are independent of one another.

The Commission further stated that: “When such telecommunications and information services [as quoted above] are *provided, purchased, and priced separately*, we conclude that they

³² *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket 96-149, FCC 96-489, First Report and Order and Further Notice of Proposed Rulemaking (rel. December 24, 1996) (“Non-Accounting Safeguards Order”).

do not collectively constitute an interLATA information service offering.” *Id.* (emphasis added). Again, the converse of this holding should be true: when access to ISPs is “provided, purchased and priced separately” from the ISP’s retail service offerings — as it undeniably is^{4/} — such access does not take on the interLATA characteristics of the ISP’s business.

The Commission should extend the logic of its rulings in the Non-Accounting Safeguards Order to this proceeding and continue to hold that the jurisdictional classifications of information services and the telecommunications services used to access them are not interrelated.

C. The So-Called “End-to-End” Test for Interstate Jurisdiction Does Not Render Traffic to ISPs InterLATA Traffic

Some incumbent LECs argue that the jurisdiction of a call depends on the so-called “end-to-end” test established in *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984). *NARUC* arose over challenges to the Commission’s ruling that it had jurisdiction over intrastate WATS lines when used to terminate traffic from interstate WATS lines. The D.C. Circuit upheld the Commission: “Every court that has considered the matter has emphasized that the nature of the communications is determinative [of jurisdiction] rather than the physical location of the

^{4/} There can be no doubt that:

- (1) access to ISPs is provided separately from ISP services because incumbent LECs originate these calls and are never affiliated with the ISPs in question;
- (2) customers purchase access to ISPs separately from ISP services because they purchase access from the incumbent LEC and information services from the ISP; and
- (3) access to ISPs and ISP services are priced separately because they are offered by two completely separate entities, incumbent LECs and ISPs.

facilities used.” *NARUC*, 746 F.2d at 1498. In this manner, the Court’s “end-to-end” test permitted the Commission to exercise its interstate jurisdiction over facilities that were otherwise part of the intrastate jurisdiction. Incumbent LECs now rely on *NARUC* for the proposition that calls to ISPs are interstate, and hence interLATA, because ISP services tend to involve interstate communications.

Setting aside the fact that *NARUC* is distinguishable on the ground that the intrastate WATS lines there were being used as part of a single interstate call — whereas calls to an ISP are separate from the ISP’s subsequent connection to the packet-switched network of the Internet — *NARUC* does not create *mandatory* interstate jurisdiction for calls that contain an interstate component. Rather, the Court held only that: “purely intrastate facilities and services used to complete even a single interstate call *may become subject to FCC regulation* to the extent of their interstate use.” *NARUC*, 746 F.2d at 1498 (emphasis added). Assuming *arguendo* that local calls to ISPs eventually travel over interstate facilities to interstate destinations (which they most certainly do not), the “purely intrastate facilities and services” used to carry calls to ISPs would not be subject to interstate jurisdiction unless the Commission affirmatively rules that they are. *NARUC*’s “end-to-end” test is not self-executing; it merely grants the Commission *permissible* jurisdiction over seemingly intrastate facilities and services.

In the instant case, at no point has the Commission subjected local calling facilities to interstate jurisdiction (except for the limited purpose of promulgating rules to govern and facilitate the exchange of reciprocal compensation for traffic that, by definition, is local). Incumbent LEC arguments regarding the “end-to-end” test do nothing to establish that local traffic to ISPs is interLATA traffic.

III. ANY RULING THAT TRAFFIC TO ISPS IS INTEREXCHANGE TRAFFIC WOULD MEAN THAT CUSTOMERS OF RBOCS COULD NOT PLACE CALLS TO ISPS AND CUSTOMERS OF INDEPENDENT LECS COULD ONLY PLACE CALLS TO ISPS THROUGH THEIR LOCAL EXCHANGE PROVIDER'S SEPARATE INTEREXCHANGE AFFILIATE

If incumbent LECs are correct in asserting that calls seemingly local in all relevant respects become interLATA calls when placed to ISPs, RBOCs have no right to carry such calls and independent LECs cannot do so without employing a separate affiliate (which they have failed to do so far). In that event, all of the traffic that incumbent LECs have carried to ISPs up to this point in time has been illegal, in violation of both Section 271 of the Act and these carriers' intrastate tariffs. Indisputably, such a result is absurd on its face and seriously calls into question any ruling that traffic to ISPs is interexchange in nature.

IV. INCUMBENTS LECS ARE ASKING THE COMMISSION FOR A "BAIL-OUT"

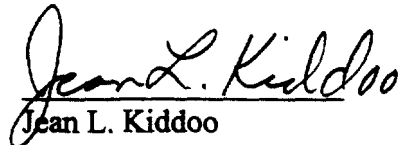
The motives of incumbent LECs, in seeking to have traffic to ISPs declared interLATA traffic, should be clear. ISPs are valuable customers. CLECs have angered incumbent LECs by wooing away many ISPs with more favorable rates and terms. Instead of competing to win these prized customers back, incumbent LECs hope to exempt traffic to ISPs from reciprocal compensation arrangements and thereby cause CLECs to incur massive, unrecoverable costs as they terminate the traffic of incumbent LEC customers to ISPs. Incumbent LECs believe that this strategy will leave CLECs no choice but to kick ISPs off their networks. In order to stay in business, ISPs will then have to return to the networks of incumbent LECs. The resulting benefits for incumbent LECs are two-fold: (1) instead of paying termination charges to a competitor, incumbent LECs pay such charges to themselves; and (2) CLECs suffer the loss of lucrative customers. The Commission should not grant incumbent LECs the competitive

advantage that they seek.

CONCLUSION

For the foregoing reasons, the Commission should issue the clarification of its Rules that
ALTS requests.

Respectfully submitted,



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Dated: July 17, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 1997, copies of COMMENTS OF RCN TELECOM SERVICES, INC. were hand-delivered to the following:

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